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IN THE

Supreme Court of the United States

October Term, 1967

NO. 1161

VALLECITO WATER COMPANY,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF

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Extraordinary misstatements of fact and law in the Commission's Brief in Opposition compel the presentation of this Reply Brief. We discuss, in turn, the Commission's assertion that this Court lacks jurisdiction to review the judgment of the California Supreme Court; its formulation of the questions presented by this petition; and, finally, its statements of fact and arguments respecting the constitutional claim presented by our petition.

JURISDICTION

The Commission contends that the federal question presented here was not properly raised below. This is not the case.

The federal question presented here was first raised during the hearings before the Commission. It will be recalled that the initial Order Instituting Investigation (reprinted in our Petition as Appendix C) had named Mr. Hickey as a party respondent. When Hickey, through his counsel, made a special appearance before the Commission to contest its jurisdiction, it was clearly stated that since the Commission was not asserting any personal jurisdiction over Hickey, any order affecting Hickey's stock ownership would be a denial of his rights under the due process clause of the United States Constitution:

> "MR. DOWNS: There are three additional reasons for the illegality of this investigation.
>
> "The investigation denies due process of law, both within the California Constitution and within the Federal Constitution."

[Mr. Downs then discussed two constitutional objections not presented here.]

> "The [third] reason for the illegality of this proceeding is the fact that Mr. Hickey is not even required to be a respondent in this proceeding.
>
> "The official position stated on the record this morning by both the Examiner and by counsel for the Commission is that admittedly Mr. Hickey is a nonutility and admittedly they are not asserting jurisdiction over him.
>
> "Yet, it is obvious from the Order Instituting

Investigation as well as from the statements of Mr. Saroyan, and I refer, for example, to page 21 of the transcript where he states that although prior to this time there has been no order that Vallecito would revise its stock records, he states this proceeding may be the proper vehicle to accomplish that result.

"So here is a man, the record showing he has paid approximately $300,000 for stock, the Commission is definitely seeking to affect his rights in that stock, and he is named just as a witness purportedly, not even as a party or a respondent with an opportunity to cross-examine or participate.

"He is confronted with orders previously decided in proceedings to which he was not a party with no opportunity to cross-examine or participate.

"In short, this very proceeding going forward without even attempting to name him as a respondent is a basic denial of due process." (R.T. Vol. 3, pp. 27[illegible] 202-203, Hearing of August 31, 1965.)

Thereafter, the federal question was squarely presented to the California Supreme Court in a petition for a writ of review of the Commissioner's order. That petition alleged that the Commission had "blatantly acted in violation of the due process provisions of the United States and California Constitutions" (Petition for Writ of Review, at p. 25)[1] and cited

[1]The Commission asserts that petitioner "did not anywhere specify what provision of the Constitution of the United States was alleged to have been violated." (Brief in Opposition, at p. 4). The point is both desperate and frivolous. Petitioner alleged a violation of the due process clause of the United States Constitution; there is only one such provision applicable to the states, and the California Supreme Court is well acquainted with it. The Commission cites Bowe v. Scott, 233 U.S. 658, 664-665 (1914), but that case involved a failure to allege a violation of the federal constitution. In the absence of such allegation, the Court assumed that the reference to the due process requirements was a citation to the state constitution. Here petitioner clearly alleged a violation of both the federal and state constitutions as respects the due process provisions.

decisions of this Court dealing with the due process requirement of a hearing. *Id.*, at pp. 25-29. The Commission's present contention that the issue was not properly before the California Supreme Court is all the more remarkable in view of its vigorous arguments in the California Supreme Court directed to the merits of that federal constitutional question and its failure even remotely to suggest to that court that the due process question was not before it. We respectfully submit that the question of due process *was* before the California Supreme Court; that both petitioner and the Commission vigorously argued it; and that this important federal question is now properly before this Court for review.

QUESTIONS PRESENTED

While we think it unseemly to burden this Reply Brief with an extended argument over the correct formulation of the Questions Presented by our petition, we do not wish to be thought to acquiesce in the Commission's version of those issues. We simply note our disagreement with the Commission's argumentative efforts—particularly with respect to their Question (4), which suffers the twin vices of inaccuracy and incoherence. We will reply in the discussion which follows to those specific allegations of fact contained in the Commission's questions which are inaccurate.

ARGUMENT

The Commission's version of the facts is in numerous respects inaccurate. We will attempt to respond to these

misstatements as we treat the substantive points made by the Commission in its Brief in Opposition.

1. The Commission asserts that, despite the repeated statements of its counsel and its Hearing Examiner that Mr. Hickey was not a party, the caption was in error and should be disregarded,[2] and that he was before the Commission solely as a witness, Mr. Hickey was somehow a party to the proceedings below. Our response to this is as follows:

(a) Our petition recites in detail the statements made by the Commission's counsel and by its Hearing Examiner (Petition, at pp. 8-9) disclaiming jurisdiction over Mr. Hickey. We need not repeat them here. The Commission admits (as it must in view of those quoted statements unambiguously reported in the transcript of proceedings) that these disclaimers took place. Nor does it point to any statements in the record contradicting these statements made by its counsel and by its Hearing Examiner. Instead, the Commission baldly urges that it is not bound by these disclaimers "plainly and inexplicably" (Brief in Opposition, at p. 9) made by its counsel and Hearing Examiner. We fail to understand

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[2] The Commission is in error when it states that "Neither staff counsel nor the Commission's hearing examiner ever said, either in so many words, or in substance, as stated on page 8 of the instant petition, that 'The caption on the order instituting investigation designating him as [respondent] was in error and should be disregarded.'" (Brief in Opposition, at p. 9.) We call the Court's attention to the following statement of the Commission's counsel at the hearing (cited previously in our Petition, at p. 8):

> "It is true that Mr. Schumacher's name is in this Order Instituting Investigation as a respondent . . . along with other . . . nonutility people, two banks and Mr. Hickey. . . .
>
> "Now, as I say, the Order . . . is very broad but I will lay this matter to rest right here and now that the staff does not intend to assert any jurisdiction or attempt for the Commission to exert any jurisdiction over Mr. Schumacher.
>
> "MR. DOWNS [Counsel for Hickey]: Mr. Saroyan, as I understand it, your statements as to Mr. Schumacher are also applicable to Mr. Hickey?
>
> "MR. SAROYAN: Yes, and it has been said two or three times at the last two days of hearings, a month ago, Mr. Downs."

how it can be other than bound; having delegated the function of holding hearings to a Hearing Examiner, the Commission cannot disclaim responsibility for his acts. And the Commission must be equally bound by the statements of its counsel who was charged with prosecuting the Commission's investigation in this case.

(b) The Commission also implies that, despite these disclaimers of jurisdiction, Mr. Hickey somehow waived his status as a non-party. It states that Mr. Hickey "appeared by his own counsel." (Brief in Opposition, at p. 5.) This was not, as the Commission implies, a general appearance, as Hickey's counsel emphasized at the outset that he was appearing specially to contest any exercise by the Commission of jurisdiction over Mr. Hickey. (R.T., Vol. 3, p. 271, Hearing of August 31, 1965.) The Commission also refers to statements of Hickey's counsel to the effect that he had "decided not to appear before the Commission." (Brief in Opposition, at p. 10.) These statements were made in reference to the decision made by Mr. Hickey on advice of counsel not to testify as a witness before the Commission. Whether he was legally correct in so doing is utterly irrelevant to the issue presented here: whether he was a *party* to the Commission's proceedings.

(c) The Commission asserts that it did not affirmatively prohibit Hickey from intervening in the proceedings. But it is wholly irrelevant that, had Hickey sought to participate as a party to the proceedings, the Commission might have permitted him to do so. The burden was on the Commission to make him a party if it chose to affect his stock rights by its orders; it was not Hickey's responsibility to volunteer or to in some way intervene. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372 (1955). As we noted in our petition (*Id.*,

at p. 19 and footnote), Hickey's position was that the Commission could not, as a matter of California law, exercise jurisdiction over nonutility individuals, and that the appropriate forum for resolution of the question of stock ownership was in a proceeding already under way in the Superior Court—a proceeding to which the Commission was invited, to participate.

2. The Commission's recital of its version of facts respecting Hickey's alleged participation in a scheme to frustrate the laws of the State of California and the Orders of the Commission is again irrelevant to the present proceeding and, for this reason only, we do not choose to reply. We do not accept these statements, but what is more important, the Commission's "findings of fact" on which they are based cannot be binding on Mr. Hickey, who was not a party to the proceedings in which they were made. We agree that these questions must be determined if the stock ownership question is ever to be resolved; but, once again, we submit that they can only be resolved in a full and fair proceeding in which all parties who may be affected may participate. That, plainly, in no way describes the proceedings which we now ask this Court to set aside.

3. We anticipated that the Commission would once again assert that petitioner lacks "standing" to protest the Commission's order directing it to cancel the stock now held by Mr. Hickey.[3] If, indeed, the question is one of standing,

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[3]We do not understand the Commission's statement that its Order directs petitioner "to cancel, not the stock, but the transfer of it." (Brief in Opposition, at p. 11.) Although that is an accurate description of the literal wording of its order, surely the same cannot be said of its effects. For if the transfer to Hickey is cancelled, so, too, will his stock as it is reflected on the books of the corporation. We doubt if the Commission would look with favor, should this Order be carried out, if thereafter we permitted Hickey to vote his stock after petitioner complied with the Order to cancel the "transfer" of that stock.

we submit that (for the reasons more fully stated in our Petition for Certiorari, at pp. 13-15) petitioner has standing because (1) it is indisputably affected by the Order; (2) compliance with the Order may subject petitioner to civil liability; and (3) as a practical matter[4], only petitioner can effectively raise the due process question we seek to present here, thus warranting the application of the doctrine of "standing by necessity" articulated by this Court in *Barrows v. Jackson*, 346 U.S. 249 (1963).[5] And as we suggested in our petition (at p. 15), the "standing" question may be in fact more accurately viewed as a question of whether the "indispensible party" requirements extend to administrative hearings. And that question requires resolution of several decisions of this Court in apparent conflict, a point with which the Commission does not come to grips.

CONCLUSION

The Commission has vigorously attempted to obscure the serious deficiency with its Order which is now before

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[4]The Commission suggests that under California law, Hickey could have filed a petition for rehearing with the Commission, and thereafter a petition for review in the California Supreme Court. (Brief in Opposition, at p. 13.) We doubt that this would be possible under California law, but need not pursue the question of local law here. For even if it were true, Hickey was not required to do so (see Whitehouse v. Illinois Central R. Co., 349 U.S. 366, 372 (1955)) and would have been foolish to intervene at that point. By then, the Commission had already made findings highly adverse to him; by petitioning for a rehearing, he might have been thought to intervene and thereby waive all right to claim thereafter that the Commission erred in making these findings and entering the Order cancelling his stock when he had not been a party.

[5]The Commission's discussion of and quotation from Barrows (Brief in Opposition, at p. 13) is again misleading. The Commission refers only to the Court's statement of the general rule regarding standing, which was stated as a prelude to its discussion of the principle of standing by necessity—an exception to that general principle on which we here rely.

this Court: it directs the cancellation of the stock, worth roughly $300,000.00, of a person not a party to its proceedings. The questions presented by that Order are substantial and, we respectfully submit, require this Court's attention. The Commission urges that the petition be denied because this case "involves only a property right of a single person." (*Id.*, at p. 14.) While we doubt that this unrestrained and cynical expression will find sympathy with this Court, we recognize the burden of the Court's case load. While we believe that the questions presented are more far reaching than the Commission implies, and urge that the petition be granted and the case set down for argument, it may not be amiss to suggest that this case presents an error so substantial and so egregious that it would be appropriate to grant this petition and reverse the judgment below *per curium*, directing that before any action to cancel Hickey's stock be taken, he be afforded the full and fair hearing on his claims that the United States Constitution requires.

Respectfully submitted,

HERBERT A. BERNHARD

Attorney for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on March , 1968, I served the within PETITIONER'S REPLY BRIEF (Vallecito Water Company v. Public Utilities Commission of the State of California – No. 1161) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the address as follows:

Mary Moran Pajalich, Chief Counsel
J. Thomason Phelps, Principal Counsel
Cyril M. Saroyan, Senior Counsel
State Building, Civic Center
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Attorneys for the Public Utilities
Commission of the State of California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March , 1968, at Los Angeles, California.

Signature

Subscribed and sworn to before me
this day of March, 1968.

Notary Public in and for the State of California.

DEAN-STANDEFER COMPANY, 215 W. 5th St., L.A. 90013
MAdison 8-6898